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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

Aaron B. Coleman,
Petitioner

-vs-

United States of America,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE SUPREME COURT OF THE UNITED STATES

AARON B. COLEMAN,
Petitioner,

-vs-

The United States of America
Respondents.

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Attorney for Petitioner

APPEARANCE

The Clerk will enter my appearance as Counsel for the Petitioner.

Signature

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The Clerk is requested to notify counsel of action of the Court by means of regular mail to the attorney for petitioner Cooper & Cohen P.C. at the above address.

QUESTIONS PRESENTED

I. WHETHER THE INTERPRETATION OF THE CIVIL SERVICE FEDERAL PERSONNEL MANUAL, 5 U.S.C §; 5596 AND 5 U.S.C. § 3341 BY THE COMPTROLLER GENERAL AND CIVIL SERVICE SERVICE COMMISSION OR THE CONFLICTING INTERPRETATION OF SAID STATUES AND REGULATIONS BY THE COURT OF CLAIMS CONTROLS.

II. WHETHER A CONTRACTUAL GOVERNMENT EMPLOYEE'S RIGHTS ARE GOVERNED BY THE ABOVE STATUTES AND REGULATIONS OR CONTRACT LAW AND 28 U.S.C. § 1491.

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ARGUMENT

1. *Petitioner properly filed his Complaint in the Court below on the theory of implied contract, as Petitioner's employment with HISA was contractual rather than appointive; depite this, Petitioner's claim was dismissed as defective and inappropriate by the lower court pursuant to a theory of law not forwarded by Petitioner in his Complaint* 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

The Petitioner, AARON B. COLEMAN, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims entered in this proceeding on April 23, 1982.

OPINION BELOW

The opinion of the Court of Claims, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Claims was entered on April 23, 1982. This petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Civil Service Federal Personnel Manual (FPM), Chapter 300, subchapter 8, paragraphs 8-4e, 8-3(b)(2); CSI 41/3; 28 U.S.C. § 5596; 5 U.S.C. § 3341; and the Tucker Act, 28 U.S.C. § 1491.

The Civil Service Federal Personnel Manual
Chapter 300, Subchapter 8,
paragraphs 8-4e and 8-3(b) (2) (1)

8-3(b) (2):

"(1) When it is found that a detail will exceed 120 days, or when there is a question of the propriety of the detail, the agency must request prior approval of the Commission on Standard Form 59.

Except for brief periods, an employee should not be detailed to perform work of a higher grade level unless there are compelling reasons for doing so. Normally, an employee should be given a temporary promotion instead."

Paragraph 8-4e of the FPM

Since extended details also conflict with the principles of job evaluating, details will be confined to a maximum period of 120 days unless prior approval of the Civil Service Commission is obtained as provided in section 8-4f. All details to higher grade positions will be confined to a maximum initial period of 120 days plus one extension for a maximum of 120 days."

28 U.S.C. § 5596.

Back pay due to unjustified personnel action.

(a) For the purpose of this section, "agency" means -

(1) an Executive agency;

(2) the Administrative Office of the United States Courts;

(3) the Library of Congress;

(4) the Government Printing Office; and

(5) the government of the District of Columbia.

(b) (1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee —

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect —

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, shall be awarded in accordance with standards established under section 7701(g) of this title; and

(B) for all purposes, is deemed to have performed service for the agency during that period, except that —

(i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and

(ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

(2) This subsection does not apply to any reclassification action nor authorize the setting aside of an otherwise

proper promotion by a selecting official from a group of properly ranked and certified candidates.

(3) For the purpose of this subsection, "grievance", and "collective bargaining agreement" have the meanings set forth in section 7103 of this title, "unfair labor practice" means an unfair labor practice described in section 7116 of this title, and "personnel action" includes the omission or failure to take an action or confer a benefit.

(c) The Office of Personnel Management shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees.

28 U.S.C. § 3341

Details; within Executive or military departments.

(a) The head of an Executive department or military department may detail employees among the bureaus and offices of his department, except employees who are required by law to be exclusively engaged on some specific work.

(b) Details under subsection (a) of this section may be made only by written order of the head of the department, and may be for not more than 120 days. These details may be renewed by written order of the head of the department in each particular case, for periods not exceeding 120 days.

28 U.S.C. § 1491.

Claims against the United States generally; actions involving Tennessee Valley Authority.

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the

purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended 16 U.S.C. § 831 et. seg., with respect to suits by or against the Authority.

STATEMENT OF THE CASE

Petitioner, AARON B. COLEMAN, was a civilian employee of the U.S. Army Tank Automotive Material Readiness Command (HISA) and began duties as a scheduler for HISA in April of 1973. Though hired as a scheduler, Petitioner filled the position of Production Control Branch Chief by verbal order of his supervisor for one year and two months in 1973 and 1974. During this 14-month period, the procedures for a formal "detail" or a temporary promotion were not complied with; Petitioner was paid at the far lower rate of scheduler.

The Branch Chief position was filled by a Mr. DeCoopman later in 1974. Petitioner continued as Acting Branch Chief during Mr. DeCoopman's frequent and extensive absences, always receiving only scheduler's pay.

In 1977 HISA realigned its employment positions and consolidated two classifications into one designation, that bearing the identification of Industrial Engineer. Petitioner trained Mr. Wenning, who was selected to fill this position. Mr. Wenning was frequently absent from his position and Petitioner was appointed Acting Branch Chief of the Engineering Resource Management Branch. Again, the procedures proper for detailing were not followed all details were oral with no notice to Civil Service. Petitioner was not compensated for the position he was improperly detailed to fill

Mr. Wenning resigned his positions as of December 15, 1978. Petitioner continued to serve as the Acting Chief of the Work Management Office in his stead. Nonetheless, Petitioner continued to be paid at a far lower rate than those indidivuals who had been formally assigned to positions Petitioner filled.

Petitioner was assured that he would be properly compensated, but was not. Further, Petitioner's relationship with HISA was based on an implied contract. Petitioner, a black man, did not file this suit until after retirement due to a justified fear of reprisal similar to adverse personnel actions witnessed by him.

REASONS FOR GRANTING THE WRIT

I. PETITIONER PROPERLY FILED HIS COMPLAINT IN THE COURT BELOW ON THEORY OF IMPLIED CONTRACT, AS PETITIONER'S EMPLOYMENT WITH HISA WAS CONTRACTUAL RATHER THAN APPOINTIVE; DESPITE THIS, PETITIONER'S CLAIM WAS DISMISSED AS DEFECTIVE AND INAPPROPRIATE BY THE LOWER COURT PURSUANT TO A THEORY OF LAW NOT FORWARDED BY PETITIONER IN HIS COMPLAINT.

Section 28 of U.S.C. § 1491 grants jurisdiction to the Court of Claims . . . "to render judgment upon *any* (emphasis added) claim against the United States . . . upon any express or implied contract with the United States . . .". For this reason, the United States District Court, Eastern District of Michigan, Southern Division, dismissed Petitioner's Complaint without prejudice on June 10, 1981, with the direction that the suit was more properly brought in the U.S. Court of Claims. This was done precisely because Petitioner's Complaint lies in contract. 28 U.S.C. § 1491 does cover employment contracts under some circumstances. *United States v. Hopkins, Special Administrator*, 427 U.S. 123 (1976). In HISA the government is not the sole proprietor and financial source. Many HISA employees are unionized. Thus the nature of the Petitioner's employment was contractual rather than appointed.

It was, therefore, improper to dismiss Petitioner's Complaint under Federal Rule 12(b) (6). Petitioner's implied contract claim was foreclosed without examination. However, under *Hopkins, supra*, it is necessary to examine whether the nature of Petitioner's employment was contractual or appointive. Petitioner has stated a claim for which relief can be granted under *Hopkins, Id.* and 28 U.S.C. § 1491. Therefore, a 12(b) (6) dismissal is in error. Further, if the Court of Claims will not hear contract claims against the United States, there is no forum which can.

Petitioner's Complaint was dismissed as failing to state a claim upon which relief may be granted under 28 U.S.C. § 5596. Petitioner contends that 28 U.S.C. § 5596 is not necessary to his Complaint. 28 U.S.C. § 1491 grants jurisdiction in a contract situation, as this court has recognized. *Hopkins, Id.* Thus, Petitioner's Complaint does state a claim for which relief may be granted under federal law. An issue of fact was presented as to whether Petitioner had an action in implied contract due to the nature of Petitioner's employment. This claim demanded examination and was not considered by the Court of Claims. Dismissal pursant to 12(b) (6) was error in this case; therefore, the matter should be remanded for a full record on the merits.

In addition, when 28 U.S.C. § 1491 was amended to cover military exchanges, it was to eliminate the "harsh result" that occurred when those dealing with a hybrid (part governmental, part private) had no forum. The *Hopkins* Court stated:

> ". . . there is nothing in the legislative history to indicate, as the Government contends, that 'contractors' did not include anyone who had formed a contractual employment relationship. Since the statue applies, by its terms, to 'any express or implied contract', we hold that it is applicable to employment contracts as well as those for goods or other services."
> 427 U.S. 123, 126.

Petitioner's Complaint was thus improperly dismissed. A clear claim "for which relief may be granted", that has been recognized by this Honorable Court, was stated therein. Therefore, certiorari to review the judgment below is justified.

II. THE DECISION BELOW CONFLICTS WITH THE ADMINISTRATION OF THE SAME STATUES AND REGULATIONS BY EXECUTIVE AGENCIES.

28 U.S.C. § 5596(A) (i) allows pay or other differentials for the period of a disallowed personnel action. The Court of Claims routinely interprets this so as to find a government employee "entitled to only the rights or salary of the position to which he has actually been appointed". *A. Leon Wilson v. The United States,* _____ Court of Claims _____, 324-816 (October 23, 1981). Wilson had a GS-9 rating but was detailed to do the work of GS-11 for 19 months with no change in his rate of pay. Even though 5 U.S.C. § 3341 (1970) and the Federal Personnel Manual (FPM) limit details to 120 days, the Court of Claims found no right to back pay. The Court of Claims has decided many such claims in this fashion, beginning with *Peters v. United States,* 208 Ct. Cl. 3[illegible].

These decisions notwithstanding, *Turner Caldwell* 55 Comp Gen 539, 542 states:

> "Therefore, where an agency fails to seek (sic) such prior approval of the Commission to extend an employee's detail period in a higher grade position past 120 days, the agency has a mandatory duty to award the employee a temporary promotion if he continues to perform the higher grade position."

The Comptroller General based his/her opinion upon the interpretation of the Civil Service Federal Personnel Manual (FPM) by the Appeals Review Board. This follows the principle of law that when an agency charged with the interpretation of a regulation speaks to the meaning of that regulation, it is entitled to be given great weight by a reviewing authority. *Udall v. Tallman,* 300 U.S. 1; 330 U.S. 1 (1965); *Bowles v. Seminole Rock Co.,* 325 U.S. 410 (1945).

The Appeals Review Board utilized FPM Chapter 300, subchapter 8, paragraph 8-4e of the FPM which states:

> Since extended details also conflict with the principles of job evaluating, details will be confined to a maximum period of 120 days unless prior approval of the Civil Service Commission is obtained as provided in section 8-4f. All details to higher grade positions will be confined to a maximum initial period of 120 days plus one extension for a maximum of 120 days.

The Board then went on to quote further from the FPM Chapter 300, subchapter 8 on "Detail of Employees" 8-3(b) (2):

> (1) When it is found that a detail will exceed 120 days, or when there is a question of the propriety of the detail, *the agency must request prior approval of the Commission* on Standard Form 59. (emphasis added)

as well as:

> Except for brief periods, an employee should not be detailed to perform work of a higher grade level unless there are compelling reasons for doing so. Normally, an employee should be given a temporary promotion instead.

Thereore, the Board ordered retroactive temporary promotions.

Subsequent to the Court of Claims decision in *Peters*, supra, the Comptroller General's office reconsidered the earlier *Turner Caldwell* decision in 456 Comp Gen 427. Therein, the Comptroller General stated:

> "It is apparent from the *Peters* decision that the Court of Claims was not informed that the Board of Appeals and Review had interpreted the Civil Service Commission's employee detail provisions as requiring mandatory temporary promotions under certain conditions, and that this Office had concurred in that result." *Id.* 431.

Thus, in matters concerning details in excess of 120 days, the Court of Claims on one hand, and the Comptroller General and Civil Service Commission on the other are in direct conflict.

The factual circumstances presented herein are frequently encountered and are addressed by every federal agency on a regular basis. A clear statement as to the meaning of 28 U.S.C. § 5596 and how FPM Chapter 300, subchapter 8, mandate the handling of extended details is urgently needed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the Court of Claims.

Respectfully submitted,

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Dated: July 21, 1982

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 670-18C

AARON B. COLEMAN	) Civilian pay; claim for increased pay for detail to higher position; noncontractual basis of federal employees' status; non-jurisdiction over tort claims
vs.	
THE UNITED STATES	

Steven Z. Cohen, attorney of record, for plaintiff.

Mark D. Friedman, with whom was *Assistant Attorney General J. Paul McGrath*, for defendant.

Before FRIEDMAN, *Chief Judge*, DAVIS and BENNETT, *Judges*.

Dated: April 23, 1982

ORDER

Plaintiff was a civilian employee of the Army. His claim is that on several occasions he was detailed to do the work of higher jobs but not paid for that higher-level work. He sues for the higher pay. There is no claim that he was ever formally promoted to or awarded any of those higher positions, but he does allege that he was explicitly or implicitly informed that he would be paid at the higher rates for these periods of service. Defendant moves to dismiss. Without oral argument, we grant that motion.

First, it is settled in this court that plaintiff cannot recover, either under the Back Pay Act, 5 U.S.C. § 5596, or under the "detail" statute, 5 U.S.C. § 3341, the pay of a higher position to which he has been detailed (either properly for the statutory maximum of 120 days, or improperly in excess of 120 days) but not promoted. This was squarely held in *A. Leon Wilson v. United States*, Ct. Cl. No. 324-81C, order of October 23, 1981. An employee held on detail, in violation of 5 U.S.C. § 3341, may possibly have an injunctive or mandatory action in a District Court to end his detail, but he does not have a monetary claim under the Tucker Act for the higher pay.[1]

Second, plaintiff, as a civilian government employee, cannot retreat to the often-invoked, but erroneous, premise that he is merely relying on the claim that he has an implied contractual right to the higher pay. We have often held that employees of the Federal Government do not have contractual rights to their positions or to the higher pay, apart from authorizing specific legislation; rather, their employment rights are normally based on statutes and regulations. *See, e.g., James G. Hilton v. United States*, Ct. Cl. No. 555-80C, order of May 12, 1981. Even if plaintiff was promised the higher pay

[1] There are no other statutes or regulations on which plaintiff relies for his claim of higher pay — or on which he can possibly rely. Congress has simply not provided for higher pay for details short of actual promotions.

of the jobs to which he was detailed, that promise would not create an enforcible contract. For the same reason, plaintiff's claim of quantum meruit is unavailing.

Third, insofar as plaintiff's complaint alleges the torts of fraud and false representation, those torts are plainly not within this court's jurisdiction. 25 U.S.C. § 1491.[2]

Accordingly, defendant's motion is granted and plaintiff's petition is dismissed.

BY THE COURT

Oscar H. Davis
Judge

Dated: April 23, 1982

[2]It would not be in the interest of justice to transfer this case to the District Court. For one thing, plaintiff initially brought suit in the District Court which dismissed it, suggesting this court as the proper forum.